# The State of New Hampshire

**Superior Court**
Northern District of Hillsborough County
300 Chestnut Street
Manchester, NH 03101
(603) 669-7410

No. 02-S-1154

In Re: Grand Jury Proceedings

Order on Motion to Enforce Compliance Audit Provision of Agreement [33]

The Roman Catholic Bishop of Manchester moves for an order enforcing an audit provision contained in a non-prosecution agreement ("agreement") between the New Hampshire Attorney General ("Attorney General") and the Diocese of Manchester ("Diocese"). The agreement was approved by this court on December 10, 2002. The Diocese invokes the authority of this court, pursuant to Section 8 of the agreement, to compel the Attorney General to commence and pay for an audit provided for in Section 4. After consideration of parties' pleadings and the arguments advanced at hearing, the court rules as follows.

I.

The pertinent facts are undisputed. In February of 2002, the Attorney General's office initiated a criminal investigation into the conduct of the Diocese regarding the manner in which it responded to allegations that some of its priests had engaged in sexual misconduct with minors. The Hillsborough County Grand Jury ("grand jury"), sitting in the Northern District,

initiated an investigation into these matters. In connection with the grand jury investigation, the Diocese produced thousands of pages of documents. Several witnesses also testified regarding their knowledge of these matters. Thereafter, the Attorney General created a task force to pursue leads and gather evidence based on the documents and testimony provided to the grand jury. The investigation disclosed facts sufficient to indict the Diocese for endangering the welfare of children. See RSA 639:3, I (Supp. 2004).

During November and December of 2002, the parties began negotiating an agreement that would conclude the grand jury investigation and provide a framework for the protection of children to a greater extent than could be realized by a possible prosecution. The agreement was approved by this court (Conboy, J.) on December 10, 2002. In the agreement, the Diocese acknowledged that the State "has evidence likely to sustain a conviction of a charge under RSA 639:3, I . . . ." In order to resolve the matter without a criminal proceeding, the Diocese agreed to, inter alia, report allegations of sexual abuse, perform training, and "[f]or a period of five years ending December 31, 2007 . . . submit to an annual audit to be performed by the Office of the Attorney General regarding compliance by the Diocese of Manchester with the terms of this Agreement and Diocesan policies." Agreement, § 2-4.

In May of 2003, the parties began negotiations concerning the initiation of the first audit.[1] During December of 2003, the Attorney General produced a proposal to provide "Compliance Review Services" from an accounting firm, KPMG, outlining the nature and scope of the audit to be performed. See Appendix to State's Obj. to M. to Enforce Compliance Audit Prov. of the Agreement., Ex. B (hereinafter "KPMG proposal"). The KPMG proposal includes four stages of review: 1) information gathering; 2) compliance program review; 3) surveying; and 4)

[1] The court recognizes that the parties' agreement contemplates a series of audits to be performed for a period of five years ending December 31, 2007. For ease of reference, the court shall refer in this order to the "audit" provision.

reporting.[2] By letter dated January 14, 2004, the Diocese outlined its concerns with the proposed audit. On February 4, 2004, the Diocese submitted a counterproposal by Guy Chapdelaine, CPA, outlining his version of an appropriate audit.

Thereafter, negotiations between the parties broke down concerning two issues– responsibility for the cost of the audit and the scope of the audit. After the parties were unable to reach an agreement, the Diocese filed the instant motion seeking enforcement of Section 4 of the agreement. The Diocese requests the court to order the Attorney General's office to: 1) bear any costs associated with the audit; and 2) conduct an audit limited to verifying the Diocese's compliance with the agreement's terms and the Diocese's internal abuse prevention policies. Following a status conference, this court requested the parties to brief the issue of whether the agreement should be found void on the basis that there was no "meeting of the minds" on critical terms. Subsequently, the court conducted a hearing on all issues relating to the enforcement motion.

II.

The first issue before the court is whether the written agreement evidences a "meeting of the minds" sufficient to constitute a contract. "Offer, acceptance, and consideration are essential to contract formation." Tsiatsios v. Tsiatsios, 140 N.H. 173, 178 (1995) (citation omitted). "In addition, there must be a meeting of the minds in order to form a valid contract." Chisholm v. Ultima Nashua Indus. Corp., 150 N.H. 141, 145 (2003) (citation omitted). "A meeting of the minds is present when the parties assent to the same terms. This is analyzed under an objective

[2] The KPMG proposal has apparently been incorporated in a draft engagement letter provided to the State, indicating the Attorney General's desire to retain KPMG to assess the Diocese's compliance with the agreement. See Supp. Mem. Of Law Submitted by the Diocese of Manchester Regarding the Parties' Meeting of the Minds and in Further Support of Motion to Enforce Compliance Audit Provision, Ex. 1 (hereinafter "KPMG Engagement Letter").

standard." Id. (citations omitted). "The parties must have the same understanding of the terms of the contract and must manifest an intention, supported by adequate consideration, to be bound by the contract." Fleet Bank-NH v. Christy's Table, 141 N.H. 285, 287-88 (1996) (citation omitted). "Mere mental assent is not sufficient; a meeting of the minds requires that the agreement be manifest." Id. (internal quotation and citation omitted).

However, "[w]hen two parties have reduced their agreement to writing, using the words that each of them consciously intends to use, it is often not a sufficient ground for declaring that the agreement is void or subject to cancellation by the court that the parties subsequently gave different meanings to the agreed language, or even that they gave different meanings thereto at the time that the agreement was expressed." Kilroe v. Troast, 117 N.H. 598, 600-01 (1977) (citation omitted). The New Hampshire Supreme Court has held that "'while it is true that contracts . . . must be definite in order to be enforceable, the standard of definiteness is one of reasonable certainty and not 'pristine preciseness.'" Chisholm, 150 N.H. at 145 (citing Phillips v. Verax Corp., 138 N.H. 240, 245 (1994)). Therefore, so long as the structure and provisions of the written agreement are "reasonably clear," even if the agreement does not resolve every issue, the court may find the existence of an enforceable contract. Id.

Here, while the agreement's terms with regard to the cost and scope of the audit are incomplete, it is "reasonably clear" that the Attorney General agreed not to prosecute the Diocese for its past handling of allegations of sexual abuse of minors in exchange for the Diocese's promises to, inter alia, report allegations of sexual abuse, provide training, and submit to an annual audit for five years. Thus, the court finds the agreement is sufficiently definite with respect to its material terms to enable the court to give them meaning. See 1 Corbin, Contracts § 4.1 (1993) (stating "the court should not frustrate [the parties'] intention [to make a contract] if it

is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left"). Accordingly, the court does not conclude that the parties' interpretive differences concerning the cost and scope of the audit preclude a finding that a "meeting of the minds" occurred. See J. Calamari & J. Perillo, Contracts § 2.9, at 52 (5th ed. 2003) (stating "[i]f the agreement is reasonably certain, it is enforced even though the contract does not set forth its terms with 'optimal specificity'"). The parties entered into an enforceable contract.

III.

The court next considers the Diocese's contention that the State must bear the cost of the audit. Both parties concede that the agreement does not expressly assign the cost of the audit. Furthermore, the parties also apparently concede that the allocation of the audit's cost was not discussed during negotiations. However, the Diocese contends: 1) the agreement's language requiring it to "submit" to an audit "to be performed" by the Attorney General, demonstrates that the auditing party must assume the cost; and 2) due process requires that ambiguities appearing in the contract resulting from "threatened corporate prosecution" must be resolved in favor of it, the target. See, e.g., Stolt-Nielsen S.A. v. United States, 352 F. Supp. 2d 553 (2005) (immunity agreement); see also, State v. Bortner, 150 N.H. 504, 508 (2004) (plea agreement). The State counters that: 1) since the Diocese's actions give rise to the need for the audit, it is not unreasonable for the Diocese to pay for it; and 2) the defendant in a criminal investigation customarily bears the cost of an audit performed as a result of its criminal actions. See, e.g., State v. Hollinrake, 608 N.W.2d 806, 809 (Iowa App. Ct. 2000) (upholding restitution order

requiring sheriff to pay the cost of an audit of his records in connection with his conviction for falsifying public documents).

"The interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for [the] court to decide." Duke/Fluor Daniel v. Hawkeye Funding, 150 N.H. 581, 582 (2004). The court must "give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, however, the parties' intent will be determined from the plain meaning of the language used in the contract." Id. (quotation and citation omitted).

The audit provision at issue states in full:

> The Diocese of Manchester shall retain all documents and information relating to allegations of sexual abuse of minors until the death of the Diocesan Personnel accused. For a period of five years ending December 31, 2007, the Diocese of Manchester agrees to submit to an annual audit to be performed by the Office of the Attorney General regarding compliance by the Diocese of Manchester with the terms of this Agreement and Diocesan policies. The audit may include, without limitation, the inspection of records and the interview of Diocesan Personnel.

Agreement, § 4. Upon careful consideration, the court declines to adopt the Diocese's contention that the plain language of the agreement requires the State to bear the audit's cost. See 190 Elm Street Realty v. Beaudoin, 151 N.H. 205, 207 (2004) (recognizing language "should be given its standard meaning as understood by reasonable people"). The Diocese argues that the language requiring it to "submit" to an audit to be "performed" by the Attorney General evidences the parties' intention that the auditing party—the State—would assume the cost. However, the court cannot conclude that this provision, designating the "auditor" and "target of the audit," necessarily allocates the audit's cost. The parties concede that the cost issue was not discussed during negotiations leading to the agreement.

The court concludes that the responsibility for the cost of the audit is an "omitted" term that may be supplied by the court. See RESTATEMENT (SECOND) OF CONTRACTS § 204, cmt. b (1981) (recognizing that "parties to an agreement may entirely fail to foresee the situation which later arises and gives rise to a dispute; they then have no expectations with respect to that situation, and a search for their meaning with respect to it is fruitless"). The law provides that a court may provide a "gap-filler" for a contract missing an essential term. See J. Calamari & J. Perillo, Contracts § 2.9, at 55 (5th ed. 2003). The RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981), states:

> When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

According to comment d, "where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process."

Both parties urge the court to adopt their "interpretive" aids to supply the missing cost term. The Attorney General contends that "principles of fairness, policy and common practice" require that the court order the Diocese to pay for the audit. The Attorney General points out that other jurisdictions have upheld restitution orders requiring defendants to pay for audits performed as a result of criminal activity. For example, In State v. Holmgren, 599 N.W.2d 876 (Wis.App. 1999), the court considered whether it was within the sentencing court's discretion to order the defendant employee to pay for an audit to determine the extent of his theft from his employer. Id. at 878-79. The court reasoned that imposition of the cost of an audit to determine the extent of the defendant's wrongdoing is an "appropriate exercise of discretion." Id. at 883 (emphasis added); see also State v. Whitaker, 797 P.2d 275, 284 (N.M.App. 1990) (providing

"[a] reasonably foreseeable consequence of defendant's fraudulent taking of money from the county was that the county would need to conduct a thorough audit to be sure that it had uncovered all of defendant's defalcations").

In contrast, the Diocese submits that the parties' agreement, like a plea or immunity agreement, implicates principles of due process and requires the court to resolve the cost issue in its favor. In the context of immunity agreements, courts have recognized the danger of a "rigid and literal construction of the terms of a plea or cooperation agreement." See U.S. v. Baird, 218 F.3d 221, 229 (3rd Cir. 2000). For example, in Stolt-Nielsen S.A. v. United States, 352 F. Supp. 2d 553 (2005), the court considered whether the Department of Justice ("DOJ") improperly attempted to void an agreement not to prosecute a defendant in exchange for its cooperation in an investigation of its coconspirators. Id. at 559. The DOJ sought to rescind the immunity agreement based upon its unilateral determination that the defendant had breached the agreement. Id. at 559. The court recognized that a suspect surrenders valuable constitutional rights by divulging incriminating information in exchange for a promise not to prosecute. Id. at 560-61. In light of this relinquishment, the court held that due process requires that: 1) a court must decide whether there has been a breach of the agreement before it could be avoided; and 2) ambiguities must be strictly construed against the government in determining whether it may rescind the immunity agreement. Id. at 560.

The Diocese contends that the immunity agreement in Stolt-Nielsen is no different from the non-prosecution agreement here in that both involve a government promise not to prosecute in exchange for certain consideration provided by the target. Accordingly, the Diocese urges this court to apply the interpretive rules used to determine the appropriateness of rescission of immunity agreements.

The Diocese also points to State v. Bortner, 150 N.H. 504 (2004), in arguing that the court should order the State to bear the cost of the audit. Id. at 508. In Bortner, the State extended an offer of immunity to the defendant, agreeing not to prosecute her for "any crimes" related to her daughter's death in exchange for her cooperation in the prosecution of her boyfriend. Id. at 507. The defendant signed the agreement and met with the State. Id. However, after meeting with the defendant the State refused to sign the agreement and charged her with two misdemeanor counts of endangering a child. Id. Bortner challenged the trial court's ruling that the State reasonably determined the defendant had breached the terms of the agreement. Id. at 508. To assess the enforceability of the immunity agreement, the Bortner Court borrowed principles developed in cases dealing with the effect of a prosecutor's alleged breach of a plea bargain. Id. The court "consider[ed] whether there was an agreement and, if so, its specific terms as [the defendant] reasonably understood them." Id. (emphasis added). Accordingly, the Diocese urges this court to adopt its "reasonable understanding" that it would not be responsible for the cost of an audit "performed by the Office of the Attorney General."

However, this case does not involve attempted rescission of an immunity agreement. The Attorney General is not now seeking to indict the Diocese or to evade performance of the State's end of the bargain. Thus, the court does not accept the Diocese's argument that criminal case law mandates full payment of the audit by the State. The court recognizes the extraordinary nature of the "consideration" provided by the Diocese, namely the agreement to, inter alia, submit to an annual audit for a period of five years.[3] However, the court cannot accept the Diocese's contention that it is not appropriate to employ contract principles, including principles

[3] The court notes that at the time the agreement was reached, the grand jury had not returned an indictment against the Diocese. Accordingly, the consideration the Diocese provided for the agreement differs from that provided by a criminal defendant entering into a plea agreement. See State v. Little, 138 N.H. 657, 660 (1994) (recognizing a defendant entering into a plea agreement gives up constitutional guarantees "including the privilege against compulsory self-incrimination and the rights to confront the witnesses against him and to obtain a trial by jury").

of fairness, to supply the omitted term in the parties' agreement. See Baird, 218 F.3d at 229 (recognizing "civil contract law is [] an important and useful aid in interpretation of agreements in criminal cases").

But neither does the court accept the Attorney General's argument that the court should exercise its discretion by ordering the Diocese to pay the full cost of the audit. The court is presented with a situation where the parties have omitted a term essential to the performance of their non-prosecution agreement. The parties are equally responsible for failing to include a term allocating cost of the audit. Under all of the circumstances, including the fact that the parties failed to address the issue in their agreement, fairness dictates that the parties equally share responsibility for the cost of the audit over the life of the agreement. Accordingly, the court rules that the Attorney General and the Diocese shall equally divide all audit costs.

IV.

The court next considers the Diocese's contention that the proposed audit: 1) exceeds the parties' agreement to measure compliance; and 2) constitutes impermissible State entanglement in the affairs of the church. Specifically, the Diocese challenges the Attorney General's authority to evaluate whether its policies and procedures are "effective." The Attorney General maintains that the State may evaluate: 1) whether the Diocese has complied with the terms of the agreement; and 2) whether policies and procedures the Diocese has established are "effective" in protecting children from sexual abuse. Furthermore, the Attorney General argues the proposed audit does not present a danger of "excessive entanglement" in the Diocese's affairs.

The court first turns to the Diocese's contention that the survey component of the KPMG proposal impermissibly: 1) seeks to measure parishioner and employee "perceptions" related to the Diocese's compliance program; and 2) seeks to measure effectiveness rather than

compliance. The Diocese argues that the survey proposal demonstrates that the Attorney impermissibly seeks to conduct a "performance audit" rather than the "compliance audit" set forth in the parties' agreement.[4]

> The survey proposal, set forth in the KPMG engagement letter, provides:
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> In addition, KPMG will conduct a one-time statistically valid, 2,000-person, paper survey, which will consist of approximately 60 closed-ended questions.[5] The survey will be performed during KPMG's second compliance assessment and will be designed to:
>
> (1) Establish a statistically-valid measure of parishioner and Diocese employee perceptions and behaviors related to the Diocese's compliance program;
> (2) Establish a baseline measure against which the Attorney General and Diocese can assess the effectiveness of its compliance program over time, through periodic re-administration of the survey; and
> (3) Develop a resource for holding discussions between the Attorney General and the Diocese in relation to the effectiveness of the Diocese's compliance program.

KPMG Engagement Letter at 3. The Diocese asserts that it is amenable to a "compliance audit," defined as one "conducted by a regulatory agency, an organization, or a third party to assess compliance with one or more sets of laws and regulations." BLACK'S LAW DICTIONARY 126 (7th ed. 1999). For example, the Diocese states it would be agreeable to a survey verifying the conduct of its personnel. Such a survey, the Diocese contends, could ask questions such as: "Did you sign and return an acknowledgement form for the diocesan policies? Did you attend safe environment training? Did you receive a copy of the mandatory reporting requirements? Have you followed the requirements? Do you know of any instance in which the requirements were

[4] The Diocese defines a performance or program audit to include "examinations and any determinations based upon the examinations as to whether the results contemplated by the legislature, or other authorizing body, have been and are being achieved by the [targeted] agency concerned, and whether such objectives could be obtained more effectively through other means." See RSA 14:31-a, I(d).

[5] The "sixty closed-ended questions" have not yet been drafted.

not followed?" See Reply of the Diocese of Manchester to the State's Mem. of Law Regarding the Parties' Meeting of the Minds at 3.

However, the Diocese contends that questions asking anything other than whether it has complied with the terms of the agreement are impermissible. The Attorney General counters that the agreement permits the State to do more than merely verify whether the Diocese has, inter alia, provided training and maintained an Office of the Delegate for Sexual Misconduct. Rather, the Attorney General contends the agreement allows it to gauge the effectiveness of the Diocese's policies and procedures.

The parties' agreement does not expressly designate the type of audit to be performed, i.e. whether the audit is a "compliance audit" or a "performance audit." The characterization of the audit, however, is not dispositive. The issue here is whether the proposed audit is authorized by the parties' agreement. Upon consideration of the parties' positions and the language of the agreement, the court finds that the agreement clearly permits the State to conduct an audit to ensure compliance by the Diocese with the following obligations:

(1) That the Diocese report allegations of sexual abuse, require all Diocesan Personnel who have contact with minors to sign an acknowledgement that they understand the reporting requirements, cooperate fully with law enforcement and/or DCYF, and remove the alleged abuser from any position in which there is the possibility for contact with minors pending the resolution of the allegations. Agreement, § 2.
(2) That the Diocese maintain the existing Office of the Delegate for Sexual Misconduct as "an appropriately-trained and easily accessible office dedicated to the handling of allegations of sexual abuse of minors." Id., § 3.
(3) That the Diocese continue to "develop, implement and revise as necessary policies and protocols for preventing, responding to, and ensuring the reporting of allegations of child sexual abuse." Id.
(4) That the Diocese "continue to provide, and to revise as needed, its on-going safety training program regarding the sexual abuse of minors and the reporting requirements for all Diocesan Personnel who have any contact with minors." Id.

(5) That the Diocese provide the Attorney General with "copies of its policies and protocols for review and comment on an annual basis pursuant to [the audit provision] or as otherwise requested. Id.

The court cannot accept the Diocese's contention that the audit may assess only whether the programs, trainings, etc. required under the agreement have been developed and/or provided. For example, under the express terms of the agreement, the Diocese must "maintain the existing Office of the Delegate for Sexual Misconduct as an appropriately-trained and easily accessible office dedicated to the handling of allegations of sexual abuse of minors." Agreement, § 3 (emphasis added). Clearly, this provision obligates the Diocese to do more than maintain an office staffed by individuals appropriately trained to handle sex abuse allegations. It must assure that the office is easily accessible and responsive to anyone wishing to press a complaint. Assessment of compliance with this obligation may be reasonably accomplished by, among other things, the surveying of parishioners and employees as to their "perceptions and behaviors." To conclude otherwise, would contravene the stated objective of the parties—to effectively protect children from sexual victimization by clergy or other church personnel.

The Diocese has also agreed "to revise as necessary" its policies and protocols for preventing, responding to, and ensuring the reporting of allegations of child sexual abuse. The agreement to "revise as necessary" child sexual abuse policies and protocols contemplates an obligation beyond merely "developing" or "implementing" such policies. Rather, the Diocese's agreement to revise such policies "as necessary" implies an agreement to submit to an audit to determine whether its policies are working—that is whether they are "effective." Such is consistent with the parties' recognition that the Diocese's obligations under the agreement are meant to "ensure a system of accountability, oversight, transparency and training." Moreover, under the express terms of the agreement, the Attorney General is authorized to conduct an audit

that "may include, without limitation, the inspection of records and the interview of Diocesan Personnel." Agreement, § 4

Based upon a careful review of the summary descriptions contained in the audit proposal, the court cannot conclude that the State seeks to conduct an audit which exceeds that which the parties agreed to. There is nothing to suggest that the Attorney General wishes to institute a system of "official and continuing surveillance" or one which substitutes the State's value judgments for church policy. In short, the court does not conclude that the proposed audit threatens the church's First Amendment rights, due process rights, or any other Federal or State constitutional rights.

The court notes, however, that it has not been provided with the sixty closed-ended survey questions the Attorney General proposes to administer. Therefore, the court makes no ruling on the appropriateness of any particular question.

So Ordered.

Date: March 22, 2005

[signed]
Carol Ann Conboy
Presiding Justice